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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	WC Docket No. 07-245
Implementation of Section 224 of the Act;	)	RM-11293
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	RM-11303

REPLY COMMENTS OF
THE ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION
THE BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA
THE BROADBAND COMMUNICATIONS ASSOCIATION OF WASHINGTON
THE CABLE TELECOMMUNICATIONS ASSOCIATION OF MARYLAND, DELAWARE & D.C.
THE CABLE TELEVISION ASSOCIATION OF GEORGIA
THE CABLE TELECOMMUNICATIONS ASSOCIATION OF NEW YORK, INC.
THE FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.
THE MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION
THE NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.
THE OREGON CABLE TELECOMMUNICATIONS ASSOCIATION
THE TEXAS CABLE ASSOCIATION

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The Alabama Cable Telecommunications Association, the Broadband Cable Association of Pennsylvania, the Broadband Communications Association of Washington, the Cable Television Association of Georgia, the Cable Telecommunications Association of New York, Inc., the Cable Telecommunications Association of Maryland, Delaware & the District of Columbia, the Florida Cable Telecommunications Association, Inc., the Missouri Cable Telecommunications Association, the New England Cable and Telecommunications Association, Inc., the Oregon Cable Telecommunications Association, and the Texas Cable Association (the "State Cable Associations") hereby submit reply comments in response to the comments filed by various electric utilities and electric industry associations in response to the Notice of Proposed

Rulemaking ("NPRM") concerning proposed amendments to the Commissions' rules and policies governing pole attachments under Section 224 of the Communications Act ("Act"), 47 U.S.C. § 224.[1]

I. INTRODUCTION AND SUMMARY

The State Cable Associations are the principal state trade associations representing cable television operators in the United States. The associations' members include cable operators serving more than 90% of the cable television subscribers in Alabama, Delaware, District of Columbia, Florida, Georgia, Maryland, Missouri, New York, Pennsylvania, New England (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont), Oregon, Texas, and Washington, or more than 30 million television households.[2] The State Cable Associations' members operate both in states that have certified to regulate pole attachments, and those that have not, and thus are subject in some instances to pole rates set by state public service commissions and in others to this Commission's pole attachments regulations.

The State Cable Associations filed comments in this proceeding opposing the proposed amendments to the Commission's pole attachment rules noting that upward adjustments to the Commission's pole attachment formula would not only significantly increase the cost of providing cable and broadband services, but would thwart broadband deployment and substantially lessen competition in video, voice and broadband services.

In their comments the State Cable Associations also noted that certified states had uniformly rejected increased pole attachment rates for broadband and telecommunications

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[1] FCC 07-187 (rel. Nov. 20, 2007), 73 Fed. Reg. 6879 (Feb. 6, 2008), corrected, 73 Fed. Reg. 8028 (Feb. 12, 2008). By Order, DA 08-582 (rel. Mar. 14, 2008), the time for filing reply comments was extended to April 22, 2008.

[2] The Florida Cable Telecommunications Association, Inc., whose member operators serve approximately five million subscribers in Florida, has joined these reply comments. FCTA is also filing separate comments addressing issues related to the storm hardening dockets before the Florida PSC and related issues. The South Carolina Cable Television Association is not a party to these reply comments.

services and, for the most part, followed the existing FCC cable rate for all cable operator attachments to incumbent local exchange carrier ("ILEC") and investor-owned electric utility ("IOU") poles, regardless of the services provided over those attachments. However, certain electric utilities and their respective trade associations filed comments here seeking increased pole attachment rates based on arguments concerning the "value" of attachments or overallocations of usable or unusable space that have already been considered and rejected by the Commission and the Courts. The electric utilities also advocate new pole attachment formulas that neither make economic sense nor have practical application.

The vast majority of certified states have adopted the judicially sanctioned FCC cable pole attachment formula. Even in those states that have not followed the FCC cable formula precisely, cable operators still pay a pole rental to the investor-owned utilities and ILECs that is close to the FCC cable rate. To the extent any alternative "formula" would allocate more usable or unusable pole space to a cable attacher, such alternative ignores the vast disparity in pole space used by cable versus the utility pole owner. Moreover, if the pole rental rates were raised to reflect the "value" an attacher receives in not having to build entirely duplicative pole plant, the rate mimics one based on "replacement cost" that the Commission has repeatedly rejected because it is not justified under economic theory as it would be inefficient and allow for utilities to engage in monopoly pricing.

Indeed, as economists and federal, state, and local governments have long recognized, sharing essential facilities at just and reasonable cost-based rates is economically efficient, pro-competitive and necessary to prevent monopoly pricing. The Commission should leave its cable pole rental formula and precedent intact. In addition, as suggested by other commenters, the Commission should forebear from imposing higher pole rental on any new broadband,

information or telecommunications service that is provided as a stand-alone or commingled service.

II. THERE IS NO ECONOMIC OR POLICY BASIS FOR FOLLOWING ANY OF THE UNIQUE AND NARROWLY APPLIED SO-CALLED ALTERNATIVE "FORMULAS" ADVOCATED BY THE ELECTRIC UTILITIES.

The alternative "formulas" advocated by the electric utilities include ones from Delaware, Indiana, Maine, and the City of Seattle, as well as one formula considered by the House of Representatives, but rejected by the House-Senate Conference Committee.[3] However, the pole formulas from Maine and Delaware are routinely not applied to cable operators or competitive local exchange carriers ("CLECs") because those formulas are flawed and impractical to apply. In addition, the State of Indiana is not even certified and thus uses the FCC formula to set cable and CLEC pole attachment rates. Also, the City of Seattle "formula" and the case cited in the utility comments concerned deference to a governing body's adoption of a limited use rate, not the adequacy or reasonableness of the FCC cable rate. Finally, the U.S. House of Representative's proposed "formula" was rejected by Congress so it has absolutely no suggested relevance here. These are but a few important details the electric utilities neglected to mention.

A. The Existing FCC Cable rate Formula More Than Adequately Compensates Pole Owners

Every federal court, including the United States Supreme Court[4] and the vast majority of public utility commissions to examine the issue (and reviewing courts affirming those decisions)

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[3] *See Comments of Concerned Utilities* at 25-36.

[4] *See, e.g., FCC v. Florida Power Corp*., 480 U.S. 245, 253-54 (1987) (hereinafter "*Florida Power*") (upholding the FCC's cable formula and finding that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory"). *See also Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002) (hereinafter "*Alabama Power*") (finding that "[b]efore a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation").

has found the exact opposite—that the cable rate is legally and economically compensatory.[5] For these reasons, this Commission has repeatedly upheld its cable formula in the face of constant electric utility attempts to charge over-compensatory rates:

> The Commission's formula has been used successfully over the years by the Commission and various states to promote reasonable, affordable, predictable, and nondiscriminatory access to poles for cable television systems. Preventing utilities from setting rates for pole attachments at levels that are well in excess of their actual costs and well above the costs that they attribute to themselves in pricing services that compete directly with those offered by attachers, precludes utilities from establishing an unfair and unjustified competitive advantage and improperly discriminating against their competitive rivals. [The utility] has not supported its assumption that the constitutional requirement of just compensation entitles [the utility] to a higher pole attachment rate than that calculated in accordance with the Pole Attachment Act and the Commission's Rules. [The utility] has not provided any credible evidence that shows that the [utility] is not compensated fully under the formula and placed in the same position monetarily as it would be but for the attachments.[6]

Indeed, there is absolutely no valid legal or economic basis put forth by any utility to adopt a formula that charges over and above the fully allocated cable rate, which assures more than adequate compensation to pole owners.

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[5] In affirming the Michigan PSC's adoption of the FCC formula in Michigan, for example, the Court of Appeals of the State of Michigan rejected an argument made by Detroit Edison: "Edison asserts, in a conclusory fashion, that the rate adopted by the PSC is unjust and unreasonable because it would require Edison's customers to subsidize the activities of the attaching parties. However, instead of explaining why the PSC's embedded costs method fails to provide adequate compensation, Edison merely states, as if it were a matter of fact . . . that the embedded costs method results in an unfair subsidy. . . . In any event, our review of the record reveals that there was competent, material, and substantial evidence to support the PSC's conclusion that a rate based on the embedded costs method would enable Utilities to recover their historical investment." *Detroit Edison Co. v. Michigan Public Serv. Comm'n*, 1998 Mich. App. LEXIS 832, at *6-7 (Nov. 24, 1998) (hereinafter "*Detroit Edison Co.*"), *aff'g Consumers Power Co., Detroit Edison Co., Setting Just and Reasonable Rates for Attachments to Utility Poles, Ducts and Conduits*, Case Nos. U-010741, U-010816, U-010831, Opinion and Order, 1997 Mich. PSC LEXIS 26 (Feb. 11, 1997), *appeal denied*, 1999 Mich. LEXIS 3252 (1999).

[6] *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, Application for Review, FCC 01-181, 16 FCC Rcd 12209, 12235 ¶ 58 (2001) (hereinafter "*Alabama Power Application for Review*"), *aff'd, Alabama Power Co. v. FCC*, 311 F.3d 1357, 1369 (11th Cir. 2002) (finding that the cable rate "provides for much more than marginal cost."). *See also Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, Initial Decision, FCC 07D-01, 22 FCC Rcd 1997, 2004 n.10 (2007) ("The evidence also fails to prove that the Cable Formula rents are insufficient to put Gulf Power in as good a position as it was before any taking of its pole space") (appeal pending).

The notion that electric utilities should be rewarded by rental rates that reflect the costs of constructing *new* distribution systems simply is not supportable.[7] The fact is that most of these systems were built before cable television even existed (which is why cable operators were forced to use this pre-existing infrastructure in the first instance) with costs recovered from captive subscribers and, in some cases, subsidized by the federal government, *e.g.*, through Rural Utilities Service loans or Universal Service Fund payments. The legislative history to the 1996 Telecommunications Act is instructive on this point, when comparing how monopoly pole owner facilities are funded, versus private company facilities:

> I filed [the] amendment . . . that addresses the part of the bill which amends existing law regarding pole attachments [to include competitive telecommunications providers]. Under the bill, all utilities are required to open up their poles, ducts, conduits or rights-of-way to other telecommunications carriers on a cost basis. . . . I filed an amendment which would have removed that obligation for nondominant [*i.e.*, competitive] telecommunications carriers. In other words, no nondominant telecommunications carrier would have to provide access on a cost basis. Instead, they would offer access on a free-market basis.
>
> The reason this amendment was filed is straightforward. I can understand requiring the incumbent monopoly to provide access on a cost basis, since the captured rate payers funded the construction. But, I cannot understand requiring other, competitive providers to provide access on a cost basis. . . . There are competitive telecommunications business that have laid line and built a long distance service through hard work and purely private capital.[8]

In addition, most cable operators have been attached to utility poles for decades during which time they have made continuous annual rental payments. A rate proposal based on higher space allocations ignores the significant fact that in addition to fully allocated (cable formula) rental payments to IOU pole owners, cable attachers also pay 100% of the "make-ready" costs

[7] Comments of Concerned Utilities at 22-25.

[8] 141 Cong. Rec. S8468 (June 15, 1995) (statement of Sen. Brown) (leading up to the Telecommunications Act of 1996).

necessary to access any pole through modification of existing plant to accommodate additional facilities or the change-out of poles where existing poles are too short. In this regard, most utilities recover all incremental or out-of-pocket costs in advance of any pole attachment through the imposition of make-ready charges and therefore receive at least the minimum required by law.

For some utilities, make-ready generates millions of dollars annually in payments from cable operators.[9] Indeed, as the Commission recognized, "[i]n instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct for its core service,"[10] and that pole (paid for exclusively by the cable attacher) immediately becomes the property of the pole owner on which the attacher subsequently pays rent. Significantly, the new approaches advocated by the electric utilities do not even take into account the substantial sums of make-ready charges paid on an up-front basis by cable operators and other third-party attachers which are fully sufficient themselves to reimburse marginal costs.[11]

It is also essential to point out, with regard to the concept of "relative use," how much more use electric utilities make of their poles, as compared to cable operators. Electric utilities typically attach multiple electric conductors, as well as large and heavy transformer facilities,

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[9] *Alabama Power*, 311 F.3d at 1369 n.21.

[10] *Alabama Power Application for Review*, 16 FCC Rcd at 12235 ¶ 58. *See also Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, 22 FCC Rcd at 2001 ¶ 11 ("These [make-ready] expenses paid by attachers are over and above the Cable Formula, showing that Gulf Power is not operating at a financial loss in complying with the Cable Formula.").

[11] "The known fact is that the Cable Rate requires the attaching cable company to pay for any "make-ready" costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make-ready and maintenance costs), in addition to some portion of the fully embedded cost . . . [so that] much more than marginal cost is paid under the Cable Rate . . . ." *Alabama Power*, 311 F.3d at 1368-69.

cross arms, guys and other apparatus that are used exclusively to benefit the utility. In many instances, the power company fully occupies the top 7 feet (or much more) of pole space.[12]

By contrast, aerial cable television facilities occupy very little pole space and are by far the lightest facilities on the pole. What cable operators physically attach to the pole is a small bracket, typically a few inches long, which supports an integrated steel messenger (housed within the cable sheath) or an external steel messenger strand to which the cable operator's conductors are then lashed. Under standard industry practice, reflected in the NESC and Bell Core "Blue Book" of Outside Plant Construction Procedures, there is a 12-inch separation to the next communications user located on the same side of the pole.[13] Thus, although cable operators actually use less than one foot of attachment space, they have always been assigned, and have always accepted responsibility for, one foot of space.[14]

[12] In this respect, the electric utilities' self-serving attempt to allocate the same amount of space to themselves as cable is another significant distortion of reality. The embedded picture exemplifies the "relative" use of the pole.

[13] Bellcore "Blue Book" – Manual of Construction Procedure, § 3.06 (1989 ed.) ("The clearance between communications cables supported on different suspension strands must be at least 12 inches on the pole.").

[14] In 1977, prior to the passage of the Pole Attachment Act, 47 U.S.C. § 224, a Senate Report "indicated a Congressional intent that cable system pole attachments be responsible for no more than 12 inches of the usable space on a pole, including actual space occupied plus clearance space." *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, FCC 01-170, 16 FCC Rcd 12103, 12129 ¶ 47 (2001) ("*2001 FCC Pole Order*"). After passage of the Pole Attachment Act, the Commission "established a rebuttable presumption of one foot as the amount of space a cable television attachment occupies when calculating a maximum rate. . . ." *Id*. (*citing Adoption of Rules for the Regulation of Cable Television Pole*

Despite this vast disparity in pole use between cable operators and electric companies, (*i.e.*, 1:7-13 feet), the alternative proposed formulas would unfairly allocate an equal share of the "unusable" space to communications attachers. Assigning this space equally among attachers, despite their disparate needs, would be unreasonable because it leads to an over-compensatory rate. On the other hand, the FCC's method of cost assignment for unusable space reflects cable's relatively moderate use of the pole and still assures the pole owner just compensation. Indeed, the certified state public utility commissions that have adopted the FCC cable formula (which represents the vast majority of those states) also recognize that the FCC cable formula allocates the cost of the entire pole, including the costs associated with unusable space.[15]

Moreover, as explained in our initial comments, the vast majority of states rely upon all aspects of the FCC's formula to establish pole rents.[16] The certified state public utility commissions that have adopted the FCC cable formula (which represents the vast majority of those states) also recognize that the FCC cable formula allocates the cost of the entire pole to attachers, including the costs associated with unusable space.[17] Virtually every state commission

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Attachment, Second Report and Order, 72 FCC 2d 59 at ¶¶ 69-70 (1979). The Commission has repeatedly affirmed this presumption. *See Petition to Adopt Rules Concerning Usable Space on Utility Poles*, Memorandum Opinion and Order, FCC 84-325, 56 RR2d 707 at ¶ 10 (1984); *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, FCC 00-116, 15 FCC 6453, 6466 ¶ 19 (2000) (hereinafter "*2000 FCC Pole Order*").

[15] *See, e.g., Order Instituting Rulemaking on the Commission's Own Motion Into Competition of Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, at *87-88 (Oct. 22, 1998) (internal citations omitted and emphasis added) (hereinafter "*California Competition Decision*") ("Since the 7.4% allocation applies to the cost of the *entire* pole, it results in a fair cost apportionment in deriving attachment rates, either for cable or telecommunications services.") (emphasis added); *Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489, at *6-7 (Oct. 2, 2002) (hereinafter "*Alaska Joint Use Order*") ("We believe it is fair to assign the unusable portion of the pole based on how the usable portion of the pole is assigned. We are not convinced from the record that alternative formulas before us are any more accurate and reasonable than the existing CATV formula.").

[16] *See* State Association Comments at 23-30.

[17] *See, e.g., California Competition Decision*, 1998 Cal. PUC LEXIS 879, at *87-88 ("Since the 7.4% allocation applies to the cost of the *entire* pole, it results in a fair cost apportionment in deriving attachment rates, either for cable or telecommunications services.") (internal citations omitted and emphasis added). *Alaska Joint Use Order*, 2002 Alas. PUC LEXIS 489, at *6-7 ("We believe it is fair to assign the unusable portion of the pole based on how the

that has considered the issue since the 1996 Act, when electric utilities were freed to enter competitive communications enterprises, has adopted the FCC cable rate approach.[18] The majority of the 19 states that have certified follow this approach. These decisions reflect the fact that the FCC cable rate is not only fully compensatory, but that higher pole rents will hinder cable and telecommunications operators' efforts to offer broadband and telecommunications services, damaging an already weak competitive telephone market and undermining broadband deployment.

In 2001 NARUC found that:

> The purpose of the 1996 Act is to encourage investment in competing facilities. When pole rents are artificially high, the cost of line extensions becomes uneconomic . . . . Lower pole rents are an incentive to attract facilities based competition . . . . Quantifying the effects of inhibited competition is difficult, if not impossible to do, but it is easy to understand that issues involving the deployment of advanced services and access to last mile infrastructure are of paramount importance.[19]

NARUC recommended that "States use the California statute as a model for determining pole attachment rates . . . ."[20] Thereafter, in 2002, the Regulatory Commission of Alaska made the same choice – deciding to continue the use of the FCC cable rate for all attachers.[21] In adopting the FCC's cable formula, the Alaska Commission recognized that "the CATV formula . . . provides the right balance given the significant power and control of the pole owner over its facilities" and "that changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers."[22]

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usable portion of the pole is assigned. We are not convinced from the record that alternative formulas before us are any more accurate and reasonable than the existing CATV formula.")

[18] *Id.*

[19] John Mann, CPA, *Pole Attachments*, Presented at the 2001 NARUC WINTER MEETINGS IN WASHINGTON, D.C., at pp. 31, 33 (Feb. 2001).

[20] *Id.* at 18-19. The California statute applies the FCC's cable formula. Cal. Pub. Util. Code § 767.5.

[21] *See Alaska Joint Use Order*, 2002 Alas. PUC LEXIS 489, at *5.

[22] *Id*.

B. The So-Called Alternative Formulas Do Not Have Any Basis For Application Here

The electric utilities refer to pole rate regulations in Indiana and Maine to argue that the conclusions of virtually all other policy makers and courts are unsound. However, it is important to note that, with respect to Indiana, which has not certified to the FCC to regulate pole attachments, the *FCC formula* is used to set pole attachment rates for cable televisions operators and CLECs.[23] The Indiana decision cited by the electric utilities arose under an Indiana statute establishing pole attachment rates *between utilities* because ILECs, pole owners themselves, are not covered by the federal Pole Attachments Act.[24]

In the Indiana decision, an Indiana cooperative electric company (Kankakee) sought to raise pole rents for Sprint and SBC from $4.20 and $7.20 "per pole" respectively to $24.29 "per attachment," and the ILECs naturally resisted. Kankakee asserted many of the same arguments heard in this proceeding from the Utilities regarding how the cost of the safety space and support space should be allocated. In the end, the Commission allowed for a sharing of these costs in a manner inconsistent with the FCC rules because the FCC approach yielded "overall percentages that are lower than either Sprint or SBC Indiana have recommended."[25] Consequently, the allocations accepted by the Indiana Commission simply reflected the "recommendations" by two pole owning ILECs that have their own interests in preserving higher pole rent charges, albeit not at the punitive levels sought by Kankakee. The Commission did *not* reach any policy judgment

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[23] Because Indiana has *not* certified to the FCC, investor-owned utilities in that state are required to charge an attachment rate based on the FCC formula. 47 C.F.R. § 1.1414(a).

[24] *See In re Complaint by United Tel. Co. of Indiana dba Sprint v. Kankakee Valley Rural Elec. Membership Corp.*, Cause No. 42755 (Ind. Util. Reg. Comm'n, Mar. 22, 2006) at 15 ("*Indiana Coop Rate Decision*"), *available at* http://www.in.gov/iurc/portal/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b631800ab695. The federal Pole Attachments Act protects cable operators and "telecommunications carriers," but telecommunications carrier is defined by Section 224(a)(5) to exclude "any incumbent local exchange carrier." 47 U.S.C. § 224(a)(5).

[25] *Indiana Coop Rate Decision* at 17. The Commission correctly observed that the 40 inch safety space is often used by electric utilities for their own facilities such as street lights.

of its own that the allocation was correct or fair, particularly as applied to non-pole owning attachers. Ultimately, the Commission rejected the cooperative's $24.29 per attachment rate and ruled that $11.50 per pole[26] would be the applicable rate, which was itself inflated due to the misallocation of safety and support space costs recommended by Sprint and SBC in setting the rate. The case is instructive, however, to demonstrate the abuses that one can expect from cooperative pole owners, even in dealing with other pole owners that have their own anti-competitive and pecuniary interests in establishing high pole rents.

Maine is an outlier with regard to its pole attachment rate formula. Poles rents in Maine have actually been set below maximum Maine formula levels through settlements with the cable and CLEC industries. Indeed, because the data required to actually establish (and verify) rates based on the "Maine" formula are "at a level of detail not utilized by [the electric utility] in FERC Form 1 reporting," litigation at the Maine Public Utilities Commission ensued the moment the utility attempted to impose it.[27] Ultimately, the cable industry and the electric utility decided to settle the litigation because "the complete adjudication of the issues . . . would involve considerable resources and expenses of both parties, and for the Maine Public Utilities Commission and its Staff. . . ."[28] (Similar to a full-blown electric rate-making case and something that could never be said about the FCC cable formula, which is easily applied without Commission intervention.)

Nevertheless, the Maine formula has had a dampening effect on competition and broadband deployment in the State. Maine is one percent under the national average in terms of the percentage of CLEC switched access lines (17%) and is extremely low in its region

[26] *See Indiana Coop Rate Decision* at 18, 20.

[27] *See, e.g., In re Cable Television Cos.*, Docket No. 93-030, Pub. Util. Rep., 4th Series, slip op. (Mar. 25, 1994) (setting negotiated pole attachment rates between the cable industry and Central Maine Power Company for four years).

[28] *Id*.

compared to Massachusetts (23%), New Hampshire (23%), and Rhode Island (47%), each of which either applies or substantially follows the FCC's formula.[29] Maine's broadband deployment similarly lags behind Massachusetts and New Hampshire (data for Rhode Island is not available), averaging 93% cable modem availability compared to 99% for both Massachusetts and New Hampshire[30] and below the national modem deployment average of 96%, demonstrating the negative effects of inflated pole attachment rates on network buildouts.

The situation in Delaware is similar to that of Maine. Utilities in Delaware also tend to rely on negotiated rates, rather than use the excessive Delaware formula for setting cable operator pole attachment rates. Finally, the unpublished *TCI Cablevision of Washington, Inc. v. City of Seattle* case discussed by the electric utilities is also inapposite. In that case, the appeals court upheld the formula used by the City, which is unregulated and afforded much "deference," on dozens of factors, and also held that, if the City had decided to use the FCC "pro rata method of allocation," that method "could also be reasonable."[31] Moreover, although Washington state municipalities' pole attachments are not regulated, the Washington Utilities and Transportation Commission does in fact use the FCC cable formula to determine just and reasonable rates for IOUs in Washington.[32] The so called "Seattle" formula is thus limited to one city, has only been justified under municipal deference, not economic theory, and has never been followed anywhere

[29] *See* FCC Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2007* (rel. Mar. 2008), Table 7. The FCC report provides a useful comparison of relative CLEC success in Maine versus neighboring states.

[30] FCC Wireline Competition Bureau, *High Speed Services for Internet Access: Status as of June 30, 2007* (rel. Mar. 2008), Table 14.

[31] *TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-5SEA, Findings of Fact, Conclusions of Law and Judgment, Conclusions of Law ¶ 30 (King County Super. Ct. May 20, 1998, J. Learned).

[32] Wash. Rev. Code § 80.54.040.

else even in its home state, which uses the FCC formula instead for setting rates for attachments to IOU poles.[33]

III. The Allegations of Unauthorized Attachments in New York and Ohio Are Not Accurately Presented.

Finally, some utilities have complained about unauthorized attachments and safety violations. While we understand that rebuttals of these allegations are contained in the Comcast Reply Comments,[34] some issues specific to the commenting associations here are appropriate. For example, National Grid alleges that its 2004-07 system wide survey resulted in increasing the number of attachments to its poles by 45%.[35] However, prior to 2004, New York pole owners, including Niagara Mohawk, National Grid's predecessor, had not enforced permitting requirements for cable operator attachments to drop poles. In 2004, the NY PSC released its Generic Pole Attachment Order, in which it acknowledged the historic practice as well as the differences between facilities placed on drop poles and those placed on distribution poles, and concluded that attachers could continue to attach to drop poles without prior consent and licensing.[36] However, the order also established a procedure going forward for attachers to notify pole owners within 10 days of attaching to drop poles "so that the attachments become a matter of record and are counted in subsequent audits."[37] The cable industry filed a petition for clarification of the order which, among other things, asked the Commission to clarify that existing attachments to drop poles would be considered grandfathered, such that pole owners

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[33] Concerned Utilities also refer to a rejected provision in a House Bill preceding the 1996 Act in support of its contention that support space should be allocated as provided in the Delaware formula. Of course, the failure of the Congress to enact the provision (in favor of an alternative) demonstrates Congress' intent not to adopt such an approach.

[34] Comcast Reply Comments at 24-28; Exhibit 3 (Declaration Michael T. Harrelson).

[35] Comments of Concerned Utilities at 74

[36] Case 03-M-0432, *Proceeding on Motion of the Commission Concerning Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, App. A at 3 (NY PSC issued and effective Aug. 6, 2004)

[37] *Id.*

could not label them as "unauthorized" and subject them to back rent and penalties. The petition is still pending.

In the meantime, National Grid conducted its survey and labeled as unauthorized those drop pole attachments that were ignored prior to 2004 and the subject of the petition for clarification. Much, if not most, of the increased number of attachments is the new permitting practices for drop poles.[38] Thus National Grid's increase in the number of unauthorized attachments was much more a result of them adjusting for what was admittedly a very poor record keeping system than it was for service drops as additional attachments. These were not really unauthorized attachments, but "unbilled" for attachments.[39]

Toledo Edison also alleged that a 2002 audit revealed that 33% of cable operator attachments were unauthorized.[40] The audit completed in 2002 covered Buckeye's core service area (which is largely within the Toledo Edison territory). To begin with, and similar to that in New York, a large percentage of the unauthorized attachments logged during audit of Buckeye's plant consisted of service drops. Though these are attachments that should have been permitted, they do not necessarily create the same level of safety concern as do hard-line attachments.

Additionally, though this does not justify the attachments identified as unauthorized, it's worthy of note that prior to 2002 according to the operator's records, a pole attachment audit had

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[38] NY operators have always been aware that a drop could be counted as an attachment and would be subject to full attachment fees. There was never a very good process for adding those attachments to the licenses. As third party attachers, operators had been granted license to build facilities in the space allotted, and if a drop was installed, the pole had sufficient space to accommodate it. The concept was that a post-construction inspection was to be done by the pole owners and they would adjust the attachments accordingly to reflect any additional attachments from the initial request/pre-construction survey, including any service drops.

[39] Between widely differing custodial billing and ownership arrangements, consolidation of the cable operations into a few large MSOs and archaic record keeping up until just a few years ago, there is really no way that the pole owners could keep the records straight. We have been very conscientious about applying for attachments, but the owners have not been good in adjusting billing to reflect those new attachments. To insinuate that the builds that we have done over the years have been "unauthorized" is a gross misstatement. True, there is some number of additional attachments for drops, but no where near the 45% they claim.

[40] Comments of Concerned Utilities at 74.

not been performed for some 25 to 30 years. This is a significant timeframe. Though the operator made every effort today to insure all attachments are properly permitted and that construction is completed in compliance with the NESC and any and all Toledo Edison operating standards, it is difficult to say exactly what all may have occurred over this time period. Toledo Edison could not claim with 100 percent assurance that some of these unauthorized attachments were not properly permitted at one time and became victim of record keeping errors on their side, all processes and systems in both organizations have been improved over the past years making tracking not only easier but far more accurate.

IV. CONCLUSION

Raising pole rents are not justified by any economic theory or reality and will achieve no significant public policy objective for interstate and foreign commerce in communication which this agency is charged with regulating. It will not accelerate broadband deployment, increase data speeds, or provide affordable Internet access for more Americans. Instead, raising pole rents will do nothing more than impose a new and massive "broadband tax" on Internet services and put additional cost pressure on cable operators, raise subscriber rates, and provide a windfall for the pole owning utilities.

Respectfully submitted,

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